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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

GERALD R. CARON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether continuing state restrictions on petitioner's possession of firearms precluded a holding that his civil rights had been restored, within the meaning of 18 U.S.C. 921(a)(20), with respect to prior felony convictions that served as the basis for imposing an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. 924(e)(1).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a)[1] is not reported. Earlier opinions of the court of appeals in this case are reported at 77 F.3d 1 (en banc) and 64 F.3d 713. The opinion of the district court (Pet. App. 3a-20a) is reported at 941 F. Supp. 238.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1997. On August 7, 1997, Justice Souter extended the time within which to file a petition for a writ of certiorari to October 6,

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[1] The pages in the appendix to the petition are not numbered. We have numbered them sequentially from 1a-21a, and we refer to those numbers in this brief.

1997. A petition for rehearing was denied on August 11, 1997. Pet. App. 21a.[2] The petition for a writ of certiorari was filed on October 8, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on four counts of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g). He was sentenced to 262 months' imprisonment under the enhanced sentencing provisions of the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e). A panel of the court of appeals affirmed, United States v. Caron (Caron I), 64 F.3d 713 (1st Cir. 1995), but the court reheard the case en banc, vacated the enhanced sentence, and remanded for resentencing. United States v. Caron (Caron II), 77 F.3d 1 (1st Cir.), cert. denied, 116 S. Ct. 2569 (1996). On remand, the district court concluded that the ACCA did not apply, but it departed upward from the range otherwise applicable under the Sentencing Guidelines and imposed a 120-month sentence. Pet. App. 2a, 3a-20a. The court of appeals reversed the holding that the ACCA did not apply, and again remanded for resentencing. Pet. App. 1a-2a.

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[2] We note that the petition was filed after the last day to which time was extended by Justice Souter's order, and that there is some question whether petitioner sought rehearing, as well as rehearing en banc, from the court of appeals. See Pet. 1. Under this Court's Rule 13.3, a suggestion of en banc rehearing is not treated as a petition for rehearing "unless so treated by the * * * court of appeals." Sup. Ct. R. 13.3; see also First Circuit Rules 35.1-35.3; compare Seventh Circuit Rule 35(c).

1. Federal law prohibits any person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" from possessing "any firearm" in or affecting commerce. 18 U.S.C. 922(g)(1). The term "firearm" is defined broadly to include "any weapon * * * which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. 921(a)(3). The Armed Career Criminal Act, 18 U.S.C. 924(e)(1), requires a mandatory minimum sentence of 15 years' imprisonment for any person convicted under Section 922(g)(1) who has "three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." For purposes of both Section 922(g)(1) and Section 924(e)(1), Section 921(a)(20) provides that

> What constitutes a conviction * * * shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had his civil rights restored shall not be considered a conviction * * *, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

2. In July 1993, law enforcement agents found petitioner intoxicated, talking with a woman, and holding a rifle, with his finger on the trigger. The agents arrested petitioner and seized the rifle and 185 rounds of ammunition. Another federal agent subsequently advised petitioner that federal law barred him from possessing firearms because he had been convicted of a felony. In December 1993, agents executed a federal search warrant and seized from petitioner six firearms and 6,823 rounds of ammunition. Pet. App. 4a n.1; Caron I, 64 F.3d at 714.

A federal jury found petitioner guilty of four counts of possessing a firearm in violation of Section 922(g)(1). The district court then found that petitioner was subject to the enhanced sentencing provisions of Section 924(e)(1). Petitioner's predicate offenses included three Massachusetts felony convictions for breaking and entering, a California conviction for assault with intent to murder and attempted murder, and a previous federal firearms conviction. Each of the four state convictions qualified as a "violent felony" for purposes of Section 924(e)(1). Pet. 3; Caron II, 77 F.3d at 2.

Petitioner argued that his Massachusetts convictions should not be counted for enhancement purposes because his civil rights had been restored, with respect to those convictions, within the meaning of Section 921(a)(20). The district court rejected that argument and sentenced petitioner as an armed career offender. The court of appeals initially affirmed both petitioner's convictions and his sentence. Caron I, supra. After granting en banc rehearing to consider a limited sentencing issue, however, the court vacated petitioner's sentence and remanded for resentencing. Caron II, supra. Reversing previous circuit precedent, the full court held that a defendant's civil rights may be restored, for purposes of Section 921(a)(20), by laws of general application. Id. at 2. The court then remanded the case to the district court for a determination whether petitioner's right to sit on a jury had been "restored" under Massachusetts law, and whether, if so, the

State had nonetheless "expressly provide[d]" that petitioner was not to carry firearms. Id. at 6.

On remand, the district court held that petitioner's right to serve on juries had indeed been restored (Pet. App. 6a-10a), and that the "unless" clause of Section 921(a)(20) did not apply to petitioner because Massachusetts law permitted petitioner, if he obtained an appropriate identification card (which he had done), to possess firearms at his home or place of business and to carry rifles or shotguns (but not handguns) on his person or in his car. Pet. App. 15a-16a. The court therefore concluded that petitioner could not be sentenced under the Armed Career Criminal Act. Id. at 16a. In resentencing, however, the court chose to depart upwards from the Sentencing Guidelines range applicable to non-career offenders, and it sentenced petitioner to ten years' imprisonment. See Pet. App. 2a.

3. The court of appeals reversed. Pet. App. 1a-2a. Relying on its intervening decision in United States v. Estrella, 104 F.3d 3, cert. denied, 117 S. Ct. 2494 (1997), the Court held that Massachusetts' ban on possession of handguns by former felons outside their homes or businesses was a sufficiently substantial restriction on the possession of firearms to preserve the federal ban in its entirety. Pet. App. 2a. Rejecting petitioner's argument that his possession of a state firearms identification card distinguished him from the "ordinary Massachusetts felon" whose situation

it had considered in Estrella, the court once again vacated petitioner's sentence and remanded the case for resentencing. Ibid.

ARGUMENT

1. Petitioner argues (Pet. 6-16) that the restrictions Massachusetts imposes on gun possession by a former felon should not be construed as "expressly provid[ing] that the [felon] may not * * * possess * * * firearms" within the meaning of 18 U.S.C. 921(a)(20).[3] This Court has recently denied review in two cases presenting the same issue, including the case on which the court below relied (Pet. App. 2a) in rejecting petitioner's claim, and there is no reason for a different result here. See Alston v. United States, No. 97-5794 (Dec. 1, 1997); Estrella v. United States, 117 S. Ct. 2494 (1997) (No. 96-9112).

The court of appeals correctly held that "a conviction counts within the meaning of § 92[1](a)(20) if the state continues in any way to restrict significantly the ex-felon's right to ship, transport, possess, or receive firearms." Pet. App. 2a. The court relied on its previous decision in United States v. Estrella, 104 F.3d 3, cert. denied, 117 S. Ct. 2494 (1997), in which it noted that, in making such a determination under Section 921(a)(20), a court must look to the convicting State's law as a whole. Id. at

[3] In its most recent decision (Pet. App. 16a-19a), the district court pointed out that petitioner has at least one federal felony conviction for which his civil rights have not been restored within the meaning of Section 921(a)(20). The court therefore concluded (Pet. App. 18a-19a) that the status of petitioner's Massachusett's convictions did not affect the validity of (as opposed to the appropriate sentence for) his present conviction under Section 922(g)(1).

7; accord, e.g., United States v. Hall, 20 F.3d 1066, 1069 (10th Cir. 1994); United States v. Burns, 934 F.2d 1157, 1159 (10th Cir. 1991), cert. denied, 502 U.S. 1124 (1992); United States v. Cassidy, 899 F.2d 543, 549 (6th Cir. 1990).

The opinion in Estrella explained (104 F.3d at 7) that, in Massachusetts, a felon who has been out of custody for more than five years may obtain a permit to possess a handgun in his residence or place of business (and to possess a rifle or long-barrel shotgun in any place). No felon, however, may carry a handgun in other places; purchase, rent, or lease a handgun; or sell, rent, or lease any firearm to another person. Ibid. On the basis of this "patchwork of restrictions" (id. at 8), the Estrella court concluded that "Massachusetts' ban on handgun possession by ex-felons outside the home or business is a substantial enough limit on firearms rights to preserve the federal ban" under the "unless" clause of Section 921(a)(20). In this case, the same court simply applied the decision in Estrella to the facts of petitioner's case. Pet. App. 2a.

The First Circuit's decisions in Estrella and in this case (as well as in United States v. Alston, 112 F.3d 32, cert. denied, No. 97-5794 (Dec. 1, 1997)) are consistent with those of at least two other courts of appeals that have considered similar partial-restriction situations under the laws of other States. See United States v. Lee, 72 F.3d 55, 57-58 (7th Cir. 1995); United States v. Driscoll, 970 F.2d 1472, 1480-1481 (6th Cir. 1992), cert. denied, 506 U.S. 1083 (1993); see also United States v. Palazzi, 115 F.3d

906, 908 (11th Cir. 1997) (following Estrella; unclear whether handgun was possessed outside defendant's home or business); United States v. Ellis, 949 F.2d 952, 954-955 (8th Cir. 1991) (state law prohibiting possession of a pistol "restricts the civil right of firearms possession" for purposes of federal law); Burns, 934 F.2d at 1160-1161 (relying on state law prohibiting only possession of short-barrelled guns).[4] The Fourth and Ninth Circuits have held, to the contrary, that the "unless" clause of Section 921(a)(20) should be construed to continue the federal firearms prohibition, with respect to a felon whose civil rights have otherwise been restored, only under circumstances in which the continuing firearms prohibitions imposed by the State of conviction itself would apply to the felon and the firearm in question. See United States v. Tomlinson, 67 F.3d 509, 513 & n.8 (4th Cir. 1995); United States v. Dahms, 938 F.2d 131, 134-135 (9th Cir. 1991); see also United States v. Wind, 986 F.2d 1248, 1251-1252 (8th Cir. 1993) (discussed in note 4, supra).[5]

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[4] The courts have adopted somewhat different rationales to support the same result. See Estrella, 104 F.3d at 8 & n.2 (citing cases). In addition, as petitioner correctly notes (Pet. 16), the Eighth Circuit's decision in United States v. Wind, 986 F.2d 1248 (8th Cir. 1993) (concurring opinion of two judges) suggests the contrary result, and is therefore in tension with that court's decision in Ellis. Such tension is ordinarily a matter to be resolved by the court of appeals whose decisions are involved. Wisniewski v. United States, 353 U.S. 901 (1957).

[5] The Ninth Circuit has concluded that Massachusetts never substantially restores the civil rights of its felons for purposes of Section 921(a)(20). United States v. Oman, 91 F.3d 1320, 1322 (1996). Thus, the Ninth Circuit would hold that petitioner's Massachusetts violent felony convictions were valid predicates for the enhancement of his sentence under Section 924(e), whether or not state law prohibited him from carrying the firearm at issue in

Even on the assumption that the conflict in the circuits on this narrow issue would warrant review by this Court, it would be premature to address the matter in this case. The Ninth Circuit recently reheard a case en banc in order to reconsider its position on the question. United States v. Qualls, 122 F.3d 38 (1997) (reargued Nov. 20, 1997). Because that court may reverse its previous holding in Dahms in light of the contrary decisions of other Circuits, it would be more appropriate to await further consideration of the matter by the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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